SUMMARY

Tak Communications, Inc., Debtor in Possession ("Tak") requests expedited action on the Consolidated Petition to Dismiss or Deny filed by Tak and others on January 25, 1993 ("Consolidated Petition").*/

If, as expected, all of Shockley Communications Corporation's ("Shockley's") applications in conflict with Tak's captioned renewals are thereupon dismissed, the Commission will then be free to turn to, and grant, Tak's captioned renewals, as well as the long-form application conditioned thereon,**/ enabling consummation of a plan of reorganization ("Plan") approved by the United States Bankruptcy Court for the Western District of Wisconsin ("Bankruptcy Court") before expiration of the Plan on January 8, 1994.

If such expedited action does not result in the dismissal of all the Shockley applications, the Commission is requested immediately to designate Shockley's surviving application or applications for hearing with Tak's corresponding renewal application or applications and, in so doing, to specify inter alia a comparison between Tak, with opportunity to prove and obtain the full benefit of Tak's renewal expectancy, and Shockley.

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*/ An opposition to the Consolidated Petition was filed March 11, 1993, and a reply to the opposition will be filed March 23, 1993.

**/ The long-form application has been forwarded by undersigned counsel for execution and will be filed with the Commission upon return, anticipated later this week.

Contemporaneous with its order confirming the plan of reorganization, the Bankruptcy Court found that Commission delay in considering Tak's renewals would adversely affect Tak's Chapter 11 estate and the interests of innocent creditors. Expedited action on the Consolidated Petition and, if necessary, in designating an appropriate comparative renewal hearing, is therefore required to avoid prejudice to Tak and to Tak's innocent creditors and to fulfill the Commission's obligation, where not inconsistent with the Communications Act, to defer to federal bankruptcy laws and policies as embodied in orders of the bankruptcy courts.

A comparison between Tak and Shockley expressly permitting Tak to prove and obtain full benefit of its renewal expectancy should be included in any hearing designation order that may issue in order to secure to Tak the benefit of the renewal expectancy to which it is entitled by Commission and Court precedent, and to avoid Commission violation of the automatic stay provision of Section 362(a) of Chapter 11, Title 11, of the United States Code (the "Bankruptcy Code"), or of the prohibition of Section 525(a) of the Bankruptcy Code against governmental non-renewal of licenses because of bankruptcy status.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In re Applications of		
Tak Communications, Inc., Debtor in Possession		
For Renewal of Licenses of		
WXOW-TV, LaCrosse, Wisconsin	File Nos.	BRCT-920731KP
WAOW-TV, Wausau, Wisconsin		BRCT-920731KY
WQOW-TV, Eau Claire, Wisconsin		BRCT-920731LA
WKOW-TV, Madison, Wisconsin		BRCT-920731LB

To: Chief, Mass Media Bureau

CONSOLIDATED PETITION FOR EXPEDITED ACTION ON PETITION TO DISMISS OR, IN THE ALTERNATIVE, FOR PROMPT DESIGNATION FOR HEARING AND RELATED RELIEF

Pursuant to Section 0.283(b)(5) of the Commission's rules, Tak Communications, Inc., Debtor-in-Possession ("Tak"), renewal applicant in the above-captioned proceedings, by its undersigned counsel, hereby petitions the Chief of the Mass Media Bureau for expedited action on the "Consolidated Petition to Dismiss or Deny" ("Consolidated Petition") filed on January 25, 1993 by Tak and others and, if all Shockley Communications Corporation's ("Shockley's") applications[1/] in conflict with Tak's captioned renewals are not in consequence immediately dismissed, for

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[1/] FCC File Nos. are as follows: BPCT-921103KE, Eau Claire, Wisconsin; BPCT-921103KF, Wausau, Wisconsin; BPCT-921103KG, Madison, Wisconsin; and BPCT-921103KH, LaCrosse, Wisconsin.

expedited issuance of a hearing designation order or orders designating any surviving Shockley application for a comparative renewal hearing with Tak's corresponding renewal application, specifying inter alia a comparison of Tak, with opportunity to prove and obtain the full benefit of its renewal expectancy, and Shockley.

I. BACKGROUND AND SUMMARY OF RELIEF REQUESTED

On January 3, 1991, Tak Communications, Inc., and its affiliate Tak Broadcasting Corporation, filed petitions in the United States Bankruptcy Court for the Western District of Wisconsin ("Bankruptcy Court") for reorganization under Chapter 11, Title 11, of the United States Bankruptcy Code ("Bankruptcy Code"). A pro forma application for transfer to the debtor in possession was granted on January 17, 1991,[2] and Tak filed for renewal of the captioned Wisconsin television licenses on July 31, 1992. Shockley filed its mutually exclusive construction permit applications on November 2, 1992.

On January 8, 1993, the Bankruptcy Court entered Findings of Fact and Conclusions of Law in Regard to Confirmation of the Amended Creditors' Plan of Reorganization ("Findings").[3] The Bankruptcy Court found inter alia, in Paragraph 9 of the Findings, that "[d]elay in considering the renewal applications and the long-form applications adversely affects the Debtors'

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[2] FCC File Nos. BALCT-910104KE through KL.

[3] The Findings are attached as Exhibit A1 to the Consolidated Petition.

chapter 11 estates and interest of Creditors . . . ." On the same day, the Bankruptcy Court entered its Order Confirming Amended Creditors' Plan of Reorganization ("Order").[4/]

By a Settlement and Consulting Agreement dated December 8, 1992, and approved by the Bankruptcy Court on January 6, 1993, Tak's sole shareholder Sharad K. Tak, in exchange for consideration set forth therein, joined with Tak's creditors in support of confirmation of the Plan by the Bankruptcy Court and agreed, inter alia, to cooperate in obtaining FCC approvals and license renewals necessary to consummation of the Plan.[5/]

Pursuant to the Plan,[6/] control of Tak will pass to a group of its major creditors and Tak will emerge from Chapter 11, if -- but only if -- pending renewals, including the instant Wisconsin television renewals, have been granted, and the Commission has consented to such transfer to the creditor group, so that each station operated by Tak on January 8, 1993 (the date the Bankruptcy Court confirmed the Plan) can be transferred in accordance with the Plan, on or before January 8, 1994. On that date, unless certain of Tak's secured and unsecured creditors, each by a majority vote, agree to extend the Plan, the Plan will be "deemed withdrawn, and the Plan and the Confirmation Order

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[4/] The Order is attached as Exhibit A2 to the Consolidated Petition.

[5/] A copy of this Agreement and the Bankruptcy Court's January 6, 1993 order approving the Agreement are appended as Exhibit A4 to the Consolidated Petition.

[6/] A copy of the Plan is appended as Exhibit A3 to Tak's

shall be void and be deemed to be of no force or effect." (Plan, para. 32.13).

On January 25, 1993, Tak and others filed a Consolidated Petition calling for immediate dismissal of all the Shockley applications. The Commission is herein requested to act expeditiously on the Consolidated Petition which, Tak believes, should result in the immediate dismissal of all the Shockley applications. But if the Commission should for any reason determine not to dismiss all Shockley's applications at this time, it is hereby requested promptly to designate any surviving Shockley application for a comparative renewal hearing with Tak's corresponding renewal application specifying, in addition to other issues against Shockley, a comparison between Tak, with full opportunity to prove and obtain the benefit of its renewal expectancy, and Shockley. Such specification is required (1) by Commission precedent in cases where long-form applications for transfer or assignment have been filed by renewal applicants subsequent to renewal overfilings necessitating a comparative renewal hearing, (2) by the public interest guidelines for award of renewal expectancies approved by the D.C. Circuit, and (3) by bankruptcy law and policy as embodied in the Bankruptcy Court's Order and in prohibitions against Commission action contained in specific provisions of the Bankruptcy Code.

II. PROMPT DISMISSAL OR DESIGNATION FOR HEARING IS REQUIRED.

The circumstances in this case clearly warrant expedited action by the Chief of the Mass Media Bureau. In King Kable Inc., DA 93-156, CSR-3754 (adopted and released Feb. 9, 1993), the Chief of the Mass Media Bureau granted expedited relief to a party seeking a waiver of the cable system anti-trafficking provisions of Section 617 of the Communications Act of 1934, as amended (Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 13, 106 Stat. 1460, 1489 (Oct. 5, 1992) (to be codified at 47 U.S.C. § 537). Section 617 requires that, absent a Commission waiver, newly acquired cable systems must be retained and operated by the purchaser for at least three years. (See 106 Stat. 1489.) King Kable, the party seeking expedited relief, was not itself in bankruptcy or in any kind of financial distress, but was the highest bidder on cable systems sold at auction by a trustee in bankruptcy. It sought permission to sell systems to third parties after acquiring them in order to finance its purchase from the bankrupt estate, and asked for expedition so that it could meet a court established deadline for its purchase. Its request was filed January 28, 1993. On February 9, only twelve days after the request was filed, and one day before the court-established deadline, the Mass Media Bureau issued a Memorandum Opinion and Order granting the required waivers, referring to the fact that "the Commission has generally attempted to conduct its proceedings in a fashion that is

consistent with federal policy as contained in the bankruptcy laws." King Kable, Inc., supra, at para. 3.

The instant request for expedited action is far more timely than the request in King Kable and it is certainly more clearly and directly grounded in bankruptcy policy. Based on that precedent, therefore, and on the authorities reviewed in pages 19-22, infra regarding the obligation of the Commission to further, and not to frustrate, bankruptcy court proceedings, the requested expedited action should be granted.

III. IF THERE IS TO BE A HEARING, PRECEDENT AND FEDERAL LAW REQUIRE A COMPARISON OF TAK, WITH BENEFIT OF ITS RENEWAL EXPECTANCY, AND SHOCKLEY.

A. Where, as here, a long-form application follows a renewal challenge, the Commission will normally defer action on the long-form pending a comparison between the renewal applicant, with benefit of its renewal expectancy, and the challenger.

Under Commission precedent, the filing of a long-form assignment or transfer application by a renewal applicant about to be designated for a comparative renewal hearing -- even though it means that the renewal applicant probably will not operate the station during the renewal period -- does not deprive the renewal applicant of its renewal expectancy. On the contrary, the Commission defers consideration of the long-form pending a comparative renewal hearing in which the renewal applicant, with the full benefit of its renewal expectancy, is compared to the challenger. Kaye-Smith Enterprises, 90 FCC 2d 105, 112 (1982). The Commission's ruling has been the same where, as here, prior to filing for renewal, the incumbent licensee has sought

protection under Chapter 11 of the Bankruptcy Code. Peoria Community Broadcasters, 79 FCC 2d 311 (1980).

In Kaye-Smith Enterprises, Kaye-Smith, a renewal applicant (that had not sought protection of Chapter 11 of the Bankruptcy Code) sought renewal of its license for KISW(FM). Hoffart Broadcasting filed a timely competing application for the KISW facilities. Two weeks later, Kaye-Smith filed a long-form application to assign KISW to Alexander Broadcasting Company. The Commission withheld action on the long-form application[1/] pending resolution of the required comparative renewal hearing. In designating the matter for hearing, the Commission said:

> [T]he Commission must address the effect of a pending assignment application for KISW(FM). On January 12, 1981, Kaye-Smith Enterprises filed an application to assign the station's license to Alexander Broadcasting Company. This followed by approximately two weeks Hoffart's filing of a competing application for the KISW(FM) frequency. A question is therefore raised as to which parties should be comparatively evaluated in the hearing proceeding -- Kaye-Smith Enterprises and Hoffart, or Alexander Broadcasting and Hoffart.

90 FCC 2d at 112. The Commission resolved the question by ordering a comparison between the renewal applicant, Kaye-Smith, and the challenger, saying:

[1/] The Commission's statutory duty to review the qualifications of a long-form assignee or transferee, and the obligation of the parties to obtain Commission consent prior to effecting an assignment or transfer, are not ministerial, but substantive requirements whose outcome cannot be taken for granted. See, e.g., Procedure on Transfer and Assignment of Licenses, 4 RR 342 (1948); Travelers Broadcasting Service Corp., 7 FCC 504 (1939). Neither can the Commission take for granted the persistence of every would-be assignee or transferee, as shown by events leading to Northwest Broadcasters, Inc., 6 FCC 2d 700 (1967) (Northwest II) discussed infra, or for that matter that every approved assignment and transfer will in fact be consummated.

> The Commission's normal practice is to compare the qualifications of the licensee and the new applicant. This is consistent with the intent of Section 310(d) of the Communications Act of 1934, as amended, which limits the Commission in assignment and transfer of control situations to the proposed assignee only.

Id. The Commission distinguished a line of cases involving defunct incumbent renewal applicants, discussed infra, where a different answer to the question had been given. At the ensuing comparative hearing, Kaye-Smith Enterprises was duly awarded a renewal expectancy for its "past broadcast record," and its license was renewed. Kaye-Smith Enterprises, 98 FCC 2d 675, 687 (Rev. Bd. 1984). The Commission thereafter, on April 30, 1985, granted the long-form assignment application (FCC File No. BALH-810112FM). BAPS Facility/Application Information Report (from 39-01-01 to 93-01-06), FM Service, at 1592-93.

In an earlier case involving a renewal applicant that had filed a Chapter 11 bankruptcy petition before filing for renewal, the Commission likewise ordered a comparison between the renewal applicant and the challenger. In Peoria Community Broadcasters, 79 FCC 2d 311 (1980), the renewal applicant filed a Chapter 11 petition in May 1976, filed an initial long-form assignment application in June, and filed for renewal in August. A competing application was filed in November. Subsequently, the renewal applicant withdrew the initial long-form assignment application and filed a second long-form, proposing a different assignee. The Commission distinguished the defunct-incumbent line of cases, discussed infra, noting that, in contrast to cases involving a liquidating trustee in bankruptcy or receiver, the

debtor in possession would (as here) be on hand to explain its actions as licensee, and would (as here) directly benefit from renewal and Commission approval of the proposed assignment. 79 FCC 2d at 328. The Commission accordingly held the pending assignment application in abeyance and ordered a hearing comparing the renewal applicant and the challenger.

If, in contrast to the situation presented in Kaye-Smith Enterprises, Peoria Community Broadcasters, and in the instant case, the renewal applicant is defunct, and has in effect forfeited its renewal expectancy -- so that a prospective assignee/transferee's application would in effect be "nullified" if the hapless renewal applicant were forced into a comparison with the challenger -- the Commission may, depending on circumstances, deem it in the public interest to depart from the normal rule and order a comparison between the prospective assignee and the challenger.[8/] Thus, in Northwest Broadcasters, Inc., 3 FCC 2d 571 (1966) (Northwest I), a long-form assignment application was filed for a station that was not on the air. Subsequently, the licensee filed for renewal. While the

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8/ If the incumbent is charged with or suspected of disqualifying misconduct, and the timing of events suggests an attempt to lateral to a pristine successor in order to avoid scrutiny of misdeeds, the Commission will require a showing that the incumbent will not benefit if the assignee prevails before ordering a comparison between the challenger and the prospective assignee. See, e.g., Newsouth Broadcasting, Inc., FCC 93-85, MM Dkt. No. 91-227 (released Feb. 25, 1993); Arthur A. Cirilli, Trustee in Bankruptcy, 2 FCC 2d 692, modified on other grounds, 4 FCC 2d 184 (1966); Northwest Broadcasters, Inc., 6 FCC 2d 700 (1967); and other cases discussed in the text, infra. Cf. Second Thursday Corp., 22 FCC 2d 515, 516, recon. granted, 25 FCC 2d 112 (1970).

assignment and renewal applications were pending, a competing construction permit application was filed. The Commission noted that the station was off the air, that the licensee had no intention of putting it back on the air, and that the assignment application had been filed before the challenge (and so was not an apparent effort to escape the consequences of disqualifying misconduct). Observing that numerous renewal applications are granted to permit qualified prospective assignee/transferees to purchase stations where no renewal challenge is pending, the Commission concluded that the assignee's application should not be "nullified" by the happenstance that a renewal challenge was pending. Id. at 573. The Commission accordingly ordered a comparison between the prospective assignee and the challenger.[9/] Accord Cleveland Board of Education, 87 FCC 2d 9, 10 (1981); Bronco Broadcasting Co., 50 FCC 2d 529, 536-37 (1974); 1400 Corporation (KBMI), 4 FCC 2d 715, 716-17 (1966).[10/]

9/ But see Northwest Broadcasters, Inc., 6 FCC 2d 700, 704-05 (1967) (Northwest II). When the prospective assignee backed out, and a new prospective assignee sought to be substituted for comparison with the challenger, the Commission declined to "save" the prospective assignee and forced the defunct renewal applicant into a comparison with the challenger, effectively nullifying the prospective assignee's application.

10/ The Audio Services Division has followed the Commission's defunct-incumbent line of cases in two recent hearing designation orders. In Bennett Gilbert Gaines, Receiver, 5 FCC Rcd 2052 (Audio Services Division 1990), the station was off the air and in the hands of a court-appointed receiver charged with liquidating the station for the benefit of creditors. The receiver put the station back on the air and turned responsibility for daily operations over to a prospective assignee who acquired the right to continue to use the operating assets from repossessing creditors. See Bennett Gilbert Gaines,

(continued...)

Tak, like the renewal applicant in Peoria Community Broadcasters, is in reorganization -- it is not defunct or in the hands of a liquidating trustee or receiver. It will, in the person of its principal Sharad K. Tak, be available to prove its entitlement to a renewal expectancy (and to answer for its record as an incumbent licensee). It, like its creditors, is plainly entitled to benefit and, again, as licensee and in the person of its principal Mr. Tak, will benefit from grant of renewal and consent to the transfer approved by the Bankruptcy Court. If the transfer does not take place because the captioned renewals are not granted, or the Commission does not approve the renewals and transfer in time -- or for any other reason -- Tak, as debtor in possession, will in the person of Mr. Tak resume and continue operating the stations pending reorganization. There is, in sum, every reason to accord Tak its renewal expectancy and no reason or precedent that supports depriving it of that expectancy. Accordingly, the relief herein requested should be granted.

10/ (...continued)
Receiver, FCC 93R-3, MM Dkt. No. 90-125 (released Mar. 6, 1993) (receiver exonerated under illegal transfer of control issue). Citing the Commission's defunct-incumbent cases, the Audio Services Division decided that the public interest would be better served by a comparison between the challenger and the prospective assignee rather than the defunct licensee. Accord James T. Davis, Trustee in Bankruptcy, 6 FCC Rcd 5044 (Audio Services Division 1991) (assets were in the hands of liquidating trustee appointed pursuant to Chapter 7 of the Bankruptcy Code).

B. Court-approved guidelines require that Tak be credited with its renewal expectancy.

The Commission's normal practice of ordering a comparison between a renewal overfiler and the renewal applicant even where a long-form assignment or transfer application has been filed (so that it is likely that the renewal applicant will not operate the station in the renewal period), is consistent with the Commission's view that the renewal expectancy is based on past performance as such, not on past performance as a predictor of future performance. The incentive/disincentive aspects of the three-part justification for the renewal expectancy established by the Commission in Cowles Broadcasting, Inc., 86 FCC 2d 993, 1013 (1981), and approved by the D.C. Circuit in Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503, 507 (D.C. Cir. 1982) (Central Florida II), cert. denied, 460 U.S. 1084 (1983), in fact constitute an additional compelling reason that Tak should receive the benefit of its renewal expectancy if a comparative hearing is necessary.

The three-part renewal expectancy statement in Central Florida II was formulated by the Commission in direct response to the Court's requirement in remanding Central Florida Enterprises, Inc. v. FCC,[11/] that the Commission state its rationale for the proposition that in a comparative renewal setting the renewal applicant's "'meritorious' past record deserves appropriate

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11/ 598 F.2d 37, 58-61 (D.C. Cir. 1978) (case remanded; FCC petition for rehearing denied) (Central Florida I), cert. dismissed sub nom. Cowles Broadcasting, Inc. v. Central Florida Enterprises, Inc., 441 U.S. 957 (1979).

weight in the overall 'public interest' determination, irrespective of the predictive value of past performance." 598 F.2d at 60. In its initial decision, the D.C. Circuit had noted the Commission's argument to this effect in passing:

> We understand the Commission's present idea of renewal expectancies may be more expansive -- that an "expectancy" may be generated by something less than or different from more meritorious service. An incumbent is said entitled to expect renewal if it has "served the public interest in . . . a substantial manner." Apparently, a "substantial" past record would be a factor weighed in the incumbent's favor irrespective of which applicant were predicted to perform better in the future. Such an entitlement would be provided to promote security directly and to induce investment which otherwise may not be made. Whether and in what manner placing such a thumb on the balance in an otherwise comparative inquiry may be reasonable are, we think, open and difficult questions.

Id. at 43 (emphasis in original). But it had nevertheless reversed the Commission's award of renewal and remanded the case. In a petition for rehearing en banc, the Commission pressed its argument that a renewal expectancy should not be based exclusively or mainly on program predictive factors addressed in the Commission's 1965 Policy Statement for comparative hearings involving only new applicants -- but rather on meritorious past performance as such:

> [U]nder the panel's ruling, substantially-performing incumbents are deprived of the "renewal expectancies" which this Court in Greater Boston viewed as "ordinary", "legitimate", and "implicit in the structure of the Act." As the Court there explained, "such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security." Pursuant to these expectancies a "substantial" or "meritorious" past record is a relevant factor to be weighed in the incumbent's favor.

> In this sense, a "meritorious" past record deserves appropriate weight in the overall "public interest" determination, irrespective of the predictive value of past performance and, contrary to the panel's view, irrespective of any finding concerning the challenger's likely future performance.

Id. at 60-61 (emphasis added) (citation omitted).

Responding to this argument, the panel acknowledged in a Supplemental Order on rehearing that the Commission's argument was "at least a plausible construction of the 'public interest.'"

> . . . If [an incumbent's meritorious record] were given enough weight (entirely apart from predicting the future), as, for example, to assure industry stability, the incumbent could conceivably prevail even were the challenger otherwise thought the better applicant. There are probably many policies, more or less inferable from the "public interest", which might be balanced together with the predicted quality of programming. We understand the Commission, in pressing renewal expectancies, to be concerned with the disincentive effects of uncertainty.

Id. at 60 (emphasis in original) (footnote omitted). However, the panel explained that the Commission had not described how it accorded weight to this non-comparative factor with sufficient clarity to permit effective judicial review, and that the remand was to give the Commission the opportunity to do so.

Taking up the Court's "suggestion" that its duty lay in clarification of the standards for awarding a renewal expectancy irrespective of the predictive value of past performance, the Commission said on remand:

> Following the court's suggestion, we now undertake to explain why Cowles' substantial past record warrants a preference sufficient to overcome Central's advantages under the diversification and integration criteria and Cowles' disadvantage under the main studio move issue. At the outset we acknowledge that a substantial past record deserves no preference under the best

> practicable service criterion set forth in the 1965 Policy Statement. Rather, our analysis concerns the somewhat different problems raised in the comparative renewal context, with which the 1965 Policy Statement does not attempt to deal. Crucial to our analysis is the fact that failure to give a renewal expectancy to incumbents rendering meritorious service to the community would result in significant public interest detriments. We use the term "renewal expectancy" here in a generic sense. In our view, the strength of the expectancy depends on the merit of the past record. Where, as in this case, the incumbent rendered substantial but not superior service, the "expectancy" takes the form of a comparative preference weighed against other factors . . . . An incumbent performing in a superior manner would receive an even stronger preference. An incumbent rendering minimal service would receive no preference. Moreover, we believe that Congress, in amending the Communications Act in 1952, ratified the Commission's judgment that these factors should be taken into account in comparative renewal proceedings.

Cowles Broadcasting, Inc., supra, 86 FCC 2d at 1012-13 (footnotes omitted). The Commission then set forth the three-part rationale for the renewal expectancy that the Court in turn accepted. Central Florida II, supra, 683 F.2d at 507 (D.C. Cir. 1982). Only one of three rationales, the one focusing on the essential unreliability of mere paper proposals as compared with actual past performance, is in any way predictive in nature;[12/] the

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[12/] The court-endorsed past-programming basis for award of the renewal expectancy in comparative renewal hearings is solid indeed compared with the claimed predictive nature of integration. The D.C. Circuit is not comfortable, to say the least, with continued use of integration as a decisive criterion. Bechtel v. FCC, 957 F.2d 873 (D.C. Cir.), cert. denied, 113 S. Ct. 57 (1992); Flagstaff Broadcasting Foundation, No. 90-1587 (D.C. Cir. 1992) (to be published at 979 F.2d 156). While the Commission continues to employ integration as decisive in new-applicant only cases, Anchor Broadcasting Limited Partnership, FCC 93-115, MM Dkt. No. 87-504 (released Mar. 10, 1993), it has recently commenced a rulemaking, Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 FCC Rcd 2664 (1992), to search for a possible alternative.

other two, in response to the panel's invitation, spell out the Commission's justifications for award of renewal expectancies irrespective of predictive value: providing an incentive and reward for quality service that otherwise would be undermined by the threat of overfilings; and avoidance of a haphazard restructuring of the broadcast industry.[13/]

In its ensuing Notice of Inquiry in BC Docket No. 81-742, Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 88 FCC 2d 120 (1981), the Commission said:

> With respect to the significance of the incumbent's record, we have made clear our view that past performance of a "substantial" or "meritorious" nature is a relevant factor to be weighed in the incumbent's favor "irrespective of [its] predictive value . . . and . . . irrespective of any finding concerning the challenger's likely future performance." Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 60, (D.C. Cir. 1978) (per curiam opinion on petition for rehearing, quoting FCC Petition for Rehearing at 7). Our policy in this regard is intended "to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security [of tenure]." Greater Boston Television Corporation v. FCC, supra, 444 F.2d at 858. Absent an incentive to render meritorious service, incumbent licensees, who would likely be at a disadvantage in future comparative renewal cases

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13/ In Victor Broadcasting, Inc. v. FCC, 722 F.2d 756 (D.C. Cir. 1983), the D.C. Circuit interpreted the Commission's three-part rationale as mere "aids in the Commission's decisional process" and recognized that "there may be circumstances where the public interest requires a renewal expectancy although all the justifications are not affirmatively shown." Id. at 762. Citing the Court's holding in Victor Broadcasting, the Commission has since categorically stated that the three justifications "need not all be present in order to entitle incumbents to renewal expectancies." Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742, 3 FCC Rcd 5179, 5188 (1988).

> insofar as criteria such as diversification and integration are concerned, might be expected to favor maximizing short-term profits at the expense of service to the public.

Id. at 123. The Commission proposed that:

> [A] renewal applicant which meets the established meritorious service standard should prevail in the comparative proceeding. . . . Absent the most compelling circumstances, we believe that only renewal applicants failing to meet the standard of meritorious service should be required to demonstrate comparative superiority.

Id. at 124 (footnotes omitted). The Commission then went on to solicit comment on what weight should be accorded this kind of renewal expectancy.

In its Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742, 3 FCC Rcd 5179 (1988), the Commission called for further comment on what weight should be accorded the renewal expectancy, and inquired particularly whether the "competitive spur" provided by renewal challenges should not be deemphasized in light of the increased competition that renewal incumbents now face from greatly multiplying broadcast and other mass media outlets -- by possibly basing the renewal expectancy on a compliance standard, rather than on a quality-of-programming standard. In so doing, however -- recognizing that it must go on deciding comparative renewal cases while its proposals are being considered -- the Commission affirmed its basic evaluation of the importance of giving significant weight to quality past performance by renewal applicants in the form of a renewal expectancy.

More recently, in Harriscope of Chicago, Inc., 5 FCC Rcd 6383, 6384-85 (1990), recon. denied, 6 FCC Rcd 4948 (1991), the Commission again stressed the importance of the incentive aspect, as distinguished from the predictive aspect of the renewal expectancy. The case was on remand from a decision of the D.C. Circuit in Monroe Communications Corp. v. FCC, 900 F.2d 351, 355-56 (D.C. Cir. 1990), in which the court, focussing on the predictive aspect of past programming, had held that the Commission had acted arbitrarily and capriciously in not faulting Video, the incumbent, for converting to STV operations and essentially abandoning non-entertainment programming. On remand, Video argued that its substandard performance under Commission standards in effect at the time (treating STV operations as not exempting broadcasters from non-entertainment programming guidelines) should in retrospect be viewed as a favorable predictor of future performance because the Commission itself later changed its mind and prospectively sanctioned others in doing what the renewal applicant had done. The Commission acknowledged the merit in this argument, but rejected it on the ground that the incentive factor underlying the renewal expectancy is designed to induce compliance with requirements in effect at the time, and is of greater importance than the predictive factor. 5 FCC Rcd at 6384.

The foregoing Commission pronouncements spell out the necessity and importance of providing, in the form of a renewal expectancy, an incentive for good performance, and avoiding the

opposite incentive -- to crass commercial exploitation while the opportunity lasts -- that would otherwise result from the threat of overfilings. As indicated, this incentive factor plainly underlies the Commission's normal practice reviewed in the preceding sub-part III A. of this Petition, and provides an additional strong reason that Tak should be accorded the benefit of its renewal expectancy in any necessary comparative hearing.

C. Court precedent and statutory bars require the relief herein sought.

1. The Commission is obligated, to the extent consistent with the Communications Act, to give effect to the bankruptcy policies embodied in the Plan approved by the Bankruptcy Court.

The D.C. Circuit first enunciated in LaRose v. FCC, 494 F.2d 1145, 1146-47 n.2 (D.C. Cir. 1974), the proposition that bankruptcy law and policy, embodied in court-approved plans protecting the interests of debtors and creditors, should be furthered, not frustrated, by the Commission's public interest determinations.[16/] More recently, the D.C. Circuit has expanded the rationale of LaRose to require the Commission, where it can do so without violating the Communications Act, to waive its own rules and policies in order to give effect to bankruptcy court orders. For example, in Telemundo, Inc. v. FCC, 802 F.2d 513, 518 (D.C. Cir. 1986), the Commission had granted a waiver of the

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16/ LaRose was decided in the context of defining the parameters of the "innocent creditor" exception to the rule of Jefferson Radio Co. v. FCC, 340 F.2d 781 (D.C. Cir. 1964) (blocking assignments or transfers by licensees whose qualifications are in issue), first recognized by the Commission in Second Thursday Corp., 22 FCC 2d 515, 516, recon. granted, 25 FCC 2d 112 (1970).

duopoly rule and approved an assignment of the debtor's assets. The Court sustained the waiver, holding:

> [T]he FCC [is] under the . . . obligation to give consideration to this court's ruling, in LaRose v. FCC, that "in recognition of the public interest in protecting innocent creditors," the Commission should approve the most advantageous sale of a bankrupt's assets when such a transaction "will not unduly interfere with the FCC mandate to ensure that the broadcast licenses are used and transferred consistently with the Communications Act." 494 F.2d at 1148.

Similarly, in Channel 64 Joint Venture, Debtor In Possession, 3 FCC Rcd 900 (1988), the debtor in possession of an operating station sought renewal in June of 1987, and filed a long-form application in September. The Chapter 11 bankruptcy court had confirmed a consensual creditors' plan to sell the station to the senior creditor/former owner who had already agreed in principle to sell a controlling interest to a third party. The main issue in the case was whether a waiver of the duopoly rule should be granted to permit a part owner of the senior creditor to hold attributable but non-controlling interests in two TV stations in the market. The Commission granted a one-year waiver in part to promote bankruptcy policies. The Commission said:

> [T]he court has stated that the Commission, in making its own public interest determinations, should consider other federal policies, to the extent possible. See LaRose v. FCC, 494 F.2d 1145, 1146-47 n.2 (D.C. Cir. 1974). [*]. We have previously given weight to the findings of a bankruptcy court in dealing with other aspects of the multiple-ownership rules. See Telemundo, Inc. v. FCC, 80[4] F.2d 513 (D.C. Cir. 1986). In the case now before us, the Bankruptcy Court has reviewed and approved a plan that, among other things, proposes the sale of [the station] to [the

> senior creditor] so as to serve the goals underlying the bankruptcy laws generally, and the innocent creditors of [the renewal applicant] specifically. Thus, grant of the assignment application will accommodate another important federal policy.
>
> [*] [Footnote in original]. LaRosa, as here, involved a station in bankruptcy. Unlike LaRosa, there are no substantial and material questions of fact as to whether the seller . . . possesses the requisite qualifications to be a Commission licensee.

Id. at 901. Despite its reluctance in other situations to grant renewal to an interim licensee, the Commission readily granted renewal to the debtor in possession to enable consummation of a plan of reorganization.[15/]

It is clearly consistent with the Communications Act for the Commission to follow its normal practice in this case and specify a comparison between the renewal applicant and the challenger. It is equally clear that the policy of the Bankruptcy Code, as embodied in the plan of reorganization approved by the Bankruptcy Court, will be served thereby. Accordingly, the authorities discussed herein require that the Commission designate a hearing in which Tak will be accorded the right to prove and benefit from its renewal expectancy.

2. Failure to credit Tak's renewal expectancy would violate the automatic stay protecting property of Tak's estate.

Failure to give effect to the renewal expectancy of the debtor in this case would not only be a departure from

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15/ In Channel 33, Inc., 3 FCC Rcd 7674, 7680 (1988), a case similar to Channel 64, Debtor In Possession, the Commission said that its waiver of the duopoly rule was "premised largely on accommodating the policies underlying the bankruptcy laws and the protection of innocent creditors."

Commission precedent, and violate court-approved renewal expectancy guidelines and the Commission's affirmative obligation to further the policy of the Bankruptcy Code, it would, by eliminating Tak's renewal expectancy, also violate the automatic stay imposed by Section 362(a)(3) of the Bankruptcy Code.[16/]

Tak's interest in its FCC licenses, including its renewal expectancy, constitutes "property of the estate" within the ambit of 11 U.S.C. § 541(a) subject to the automatic stay provision contained in 11 U.S.C. § 362(a).[17/] Subparagraph (3) of that

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16/ Section 362(a)(3) of the Bankruptcy Code imposes an automatic stay, effective upon the filing of a bankruptcy petition, against "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

17/ Fugazy Express, Inc. v. Fugazy, 124 B.R. 426, 430 (S.D.N.Y. 1991) (affirming on de novo review In the matter of Fugazy Express, Inc., 114 B.R. 865 (Bankr. S.D.N.Y. 1990)), appeal dismissed for lack of appellate jurisdiction, 982 F.2d 769, 774-76 (2d Cir. 1992); Brown Transport Truckload, Inc., 118 B.R. 889 (Bankr. N.D. Ga. 1990); Drexel Burnham Lambert Group Inc., Debtors, 120 B.R. 724 (Bankr. S.D.N.Y. 1990); Prudential Lines, Inc., Debtor v. PSS Steamship Co., 107 B.R. 832 (Bankr. S.D.N.Y. 1989); In re Smith, 94 B.R. 220, 221 (Bankr. M.D. Ga. 1988). These and other authorities are discussed infra.

In Tak Communications, Inc. v. New Bank of New England, No. 92-1961, 1993 WL 29132 (7th Cir. Feb. 9, 1993), affirming In re Tak Communications, Inc., 138 B.R. 568 (W.D. Wis. 1992), the Seventh Circuit upheld the Commission's traditional refusal to recognize security interests in FCC licenses (e.g., Twelve Seventy, Inc., 1 FCC 2d 965, 967 (1965)). In so doing, the Seventh Circuit, like the district court, 138 B.R. at 576, made clear that its holding was in no way inconsistent with the holding of the Commission in In re Walsh, 3 FCC Rcd 6502 (1988), permitting sale of a "bare" license for unbuilt cellular facilities, or with the holding of the district court in Fugazy, supra, including an FCC license in "property of the estate" of a debtor in bankruptcy (1993 WL 29132).

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